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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 63

CONNECTICUT RAILWAY & LIGHTING COMPANY,

Petitioner

vs.

HOWARD S. PALMER, JAMES LEE LOOMIS AND HENRY B. SAWYER, AS TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR,

Respondents.

BRIEF FOR RESPONDENTS

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OPINIONS BELOW

The District Court's opinion (R. pp. 313-366) is not officially reported. The opinion of the Circuit Court of Appeals (R. pp. 1361-1366) is reported at 95 F. (2d) 483.

JURISDICTION

The order for mandate was entered on March 14, 1938 (R. pp. 1366-1367). The petition for certiorari was filed on May 28, 1938 and was granted on October 10, 1938. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 and Section 24(c) of the Bankruptcy Act as amended.

QUESTION PRESENTED

In proceedings to reorganize a railroad under Section 77 of the Bankruptcy Act, if a lease is rejected by the trustees of the estate of the lessee, what is the measure of damages recoverable by the lessor for loss of future rent?*

STATUTE INVOLVED

The statute involved is Section 77, Subsection (b), of the Bankruptcy Act (11 U. S. C. A. Section 205), the pertinent provision of which is

> "In case an executory contract or unexpired lease of property shall be rejected, or shall not have been adopted by a trustee appointed under this section, or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, or shall be rejected by any plan, any person injured by such nonadoption or rejection shall for all purposes of this section be deemed to be a creditor of the debtor to the extent of the actual damage or injury determined in accordance with principles obtaining in equity proceedings."

STATEMENT

In 1906 the petitioner leased to the predecessor of The New York, New Haven and Hartford Railroad Company (hereinafter called the New Haven) certain street railway properties. The term of the lease was 999 years (R. p. 106). The lease provided that if the lessee failed to pay the rent or committed other default, the lessor had an option to terminate the lease and repossess the property "without prejudice to its right of action for arrears of rent or breach of covenant" (R. p. 125). It contained no covenant of indemnity or other provision for damages

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*Petitioner's brief (pp. 5-6, 9, 11, 14, 21-28, 31-43) asserts that there is also presented a question as to deficiencies in the property returned to the lessor. This question was not included in the petition for certiorari, however, or mentioned in the brief in support thereof. It is therefore not before the Court for consideration (See infra, p. 24.).

or termination on insolvency or bankruptcy of the lessee (R. pp. 101-129). The lessee agreed to pay to the taxing authorities all taxes lawfully imposed or assessed on the lessor with reference to the demised property or the lessor's income therefrom (R. p. 114).

The annual rental reserved for the street railway properties was, in 1935, $1,049,563.50 (R. p. 619), which included interest and sinking fund payments on the lessor's bonds. On retirement of those bonds, which mature in 1951, it would have been reduced to $544,588.50 (R. pp. 120, 361, 628).

The lessee entered into possession and during the succeeding years it, or its sub-tenant (The Connecticut Company, a wholly-owned subsidiary of the New Haven—R. p. 314) added to the demised premises several million dollars' worth of physical property and paid several million dollars into a sinking fund for the retirement of the lessor's outstanding bonds (R. pp. 568, 573-588, 621, 1313-1314). Under the terms of the lease the lessee was to be compensated for such additional physical property unless the lease was terminated for its default and was given a claim for the entire contents of the sinking fund (R. pp. 118-119, 121, 125-126).

On October 23, 1935, the New Haven filed and the court approved a petition for reorganization under Section 77 of the Bankruptcy Act. The respondents were duly appointed trustees of its property. On December 18, 1935 with the approval of the court they rejected the lease of petitioner's properties (R. pp. 18-19, 47). The petitioner filed claims against the New Haven's estate (R. pp. 61-76) and the respondents filed cross-claims for the value of the additions to the physical property and the sinking fund (R. pp. 82-84). On November 16, 1936 the petitioner, pursuant to order of the court entered on its petition, repossessed the property (R. pp. 283, 290). Hearings on the claims and cross-claims were held beginning on June 30, 1937 (R. p. 377).

The District Court held that under Section 77 a landlord's claim for rejection of a lease is provable but that the amount of damages which can be allowed therefor is limited and that the landlord can recover its actual damages (measured by the difference between the rent reserved and the net earnings received from the property) up to the latest date which the court finds practicable during the course of the reorganization proceedings. Applying this formula the court awarded to petitioner the sum of $1,263,412.92 for the period from rejection of the lease to June 30, 1937, with leave to apply for a supplemental hearing to liquidate any damage which might accrue thereafter up to the date of such supplemental hearing (R. pp. 326-338, 372). No damages were awarded against the New Haven's estate for the period from petition filed to rejection because damages equal to the full rental for that period were allowed to petitioner as a charge of administration on its contemporaneously determined claim against The Connecticut Company, which had been operating the property under a sublease from the New Haven during that period (R. pp. 356-361, 376, and see *In re The Connecticut Company*, 95 F. (2d) 311).

The District Court held that for the period following the rejection of the lease petitioner had not proved that any Federal income taxes had been imposed or assessed upon it with reference to the demised property or the income therefrom, and refused to allow any damages on account of Federal income taxes for that period (R. fols. 1025-1026). The cross-claims for the value of additions to the physical property and sinking fund were denied (R. p. 376).

Cross-appeals were taken to the Circuit Court of Appeals, which in general affirmed the District Court's decision. The appellate court held that the claim for rejection of the lease was provable and dischargeable and that the statute imposed a limit on the amount of damages which could be recovered therefor. It interpreted the limitation

contained in the statute to mean that recovery "should be limited in a way to do substantial equity in each case," and found that the method followed and the amount of damages arrived at by the District Court were correct, except that the petitioner's Federal income tax for the period between the rejection of the lease and the date of hearing should be added. It affirmed the denial of the cross-claims (R. pp. 1363-1366), thus finally and authoritatively interpreting the lease to mean that the lessee had lost its rights to the sinking fund and to be reimbursed for the additions to the physical property.

The mandate not having been stayed, the District Court on September 30, 1938, upon application of petitioner and after hearing, entered an order on mandate decreeing that for the period from rejection to initial hearing petitioner could recover $1,263,412.92, with leave to apply, within such time as the court should fix, for final hearing to liquidate (1) any damage to petitioner from rejection of the lease which might accrue between the date of the original hearing and the date of the final hearing, and (2) any damage for breach of the covenant to pay taxes for the period from rejection to date of final hearing.

The petitioner on May 28, 1938 filed its petition for certiorari (No. 63, October term, 1938) which was granted October 10, 1938. Respondents on June 10, 1938 filed a cross petition for certiorari (No. 105, October term, 1938) urging this Court, if it should grant petitioner's petition, to consider in addition to the questions therein presented whether the Circuit Court of Appeals had not erred (1) in failing to take into account the benefits accruing to petitioner from the forfeiture of the additional physical property and sinking fund and (2) in failing to hold that such benefits constituted the full measure of petitioner's "actual damage or injury determined in accordance with principles obtaining in equity proceedings." The cross petition was denied on October 10, 1938.

The Record before the Circuit Court of Appeals contained 1360 pages relating to seven separate issues included in the cross appeals. Only one of those issues was raised by the petition for certiorari. The portions of the Record bearing upon that issue are confined to about 200 pages, a list of which will be found in the Appendix of this brief.

SUMMARY OF ARGUMENT

1. Section 77 of the Bankruptcy Act places a limit upon the amount of damages which a landlord may recover for loss of future rent on rejection of his lease.

2. The limit is defined by the requirements governing the allowability of future damages in equity receiverships.

3. The formula adopted by the lower courts in this case constitutes a fair and practicable method of applying the limit.

4. As so interpreted the statute is constitutional.

ARGUMENT

1. Existence of a Limit.

The history of the language of the Act includes three important stages:

Stage One. Section 77 as originally enacted in 1933 defined creditors as

> "holders of claims . . . of whatever character against the debtor or its property, including claim for future rent, whether or not such claims . . . would otherwise constitute provable claims under this act" (Act of Mar. 3, 1933).

There was no further reference to leases or landlords' claims.

Stage Two. The section was amended in 1935. The amendment as originally introduced in the House provided that "creditors" should include

> "all holders of claims of whatever character against the debtor or its property, whether or not such claims would otherwise constitute provable claims under this Act, including the holder of a claim under a contract executory in whole or in part including an unexpired lease."

It also provided that in case of the rejection or non-adoption of an executory contract or unexpired lease

> "any person injured by such nonadoption or rejection shall, for all purposes of this section, be deemed to be a creditor to the extent of such damage or injury" (H.R. 6249, 74th Congress, First Session).

Stage Three. In the statute as finally adopted the definition of creditors was not changed from that in Stage Two, but the provision concerning non-adoption or rejection of executory contracts and leases was amended by substituting for the words "such damage or injury" the phrase "the actual damage or injury determined in accordance with principles obtaining in equity proceedings" (Act of Aug. 27, 1935).

There is nothing in the legislative history of the section to explain the purpose and meaning of the amendment.

From this it appears that neither in the 1933 Act nor in the 1935 amendment as originally proposed was there any restriction on the amount of a landlord's damages. Before enactment of the 1935 amendment, however, certain words were added. And they are words of limitation.

The change in the language indicates an intention on Congress' part to change the meaning. The amending words cannot be disregarded. They must be given their normal significance. Whatever question may arise as to just what limitation is intended, there can be no question that the amendment imports into the statute some sort of a limitation on the amount of damages allowable.

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word'" (*Ex parte Public National Bank of New York*, 278 U. S. 101, 104. See also *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208).
>
> "The deliberate selection of language so differing from that used in the earlier Acts indicates that a change in the law was intended" (*Brewster* v. *Gage*, 280 U. S. 327, 337).

2. The Nature of the Limit.

What is meant by "actual damage or injury determined in accordance with principles obtaining in equity proceedings"?

No court has yet construed these words except the two lower courts in the present case.*

The "equity proceedings" mentioned in sub-section (b) of Section 77 undoubtedly refer to equity receiverships. Earlier in the same paragraph of sub-section (b) it is provided that unsecured claims

> "which would have been entitled to priority if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval of the petition"

---

*In the case arising out of the claim of the Old Colony Railroad Trustees against the New Haven's estate for rejection of the Old Colony lease, the same courts followed their decisions herein. See *Old Colony Railroad Company* v. *The New York, New Haven and Hartford Railroad Company*, 98 F. (2d) 670.

The same courts decided *Annett* v. *The New York, New Haven and Hartford Railroad Company* (92 F. (2d) 428), which petitioner refers to on page 19 of its brief as supposedly inconsistent with their later decisions herein. The *Annett* case involved an agreement to make monthly payments during the life of a person who had been injured on a New Haven train. The entire consideration for those payments was past. The New Haven Trustees had no discretion to reject or adopt the contract. They could not have continued payments without giving a preference. The contract was, therefore, not executory within the meaning of Section 77. Nor did the courts mention the provision dealing with the rejection of executory contracts.

shall be entitled to such priority. It is also provided that in case an executory contract or lease shall be rejected or not adopted by a trustee appointed under this section

> "or shall have been rejected by a receiver in equity in a proceeding pending prior to the institution of a proceeding under this section"

any person injured shall be deemed to be a creditor to the extent of the actual damage "determined in accordance with principles obtaining in equity proceedings". The two earlier references in the same paragraph to equity receiverships indicate that the later words "equity proceedings" refer to such receiverships.

The Circuit Court of Appeals for the Second Circuit in 1912 in *Pennsylvania Steel Company* v. *New York City Railway Company* (198 Fed. 721) announced a rule for the allowance of claims in equity receivership cases which has been generally followed ever since. The Court said

> "Claims which when presented within the time limited by the court for their presentation are certain or are capable of being made certain by recognized methods of computation, should be allowed. Claims which are not then certain should be disallowed because they afford no basis for making dividends" (198 F. 721, 741-742).

The doctrine has been cited with approval by this Court (See *William Filene's Sons Co.* v. *Weed*, 245 U. S. 597, 601-602), and has been generally applied in receivership cases.

This Court in *City Bank Farmers Trust Co.* v. *Irving Trust Co.* (299 U. S. 433) passed upon the provisions of Section 77B of the Bankruptcy Act relating to the claim of a landlord for rejection of his lease. Section 77 contains almost identical language except as to the basis for limiting damages. The Court's comments on the one are therefore largely applicable to the other.

In the *City Bank* case it was said

> "As § 77B supplements and extends the bankrupt system in force at the time of its enactment, we sha examine the question in the light of the old law, th supposed mischief arising under it and the alter tions made by the later act" (299 U. S. 436-437).

This is equally true of Section 77.

The old law "gave a landlord no provable claim f rent to accrue after the trustee's rejection of a lease The tenant's liability for future rent remained enforc able as installments fell due. This involved hardship both lessor and lessee.

> "In the case of a corporate, and often in that of a individual lessee, the landlord's right to collect re from a bankrupt tenant was valueless" (Id. 437).
>
> "The purpose of § 77B was to facilitate rehabilit tion of embarrassed corporations by a scaling or r arrangement of their obligations and shareholder interests, thus avoiding a winding up, a sale of asset and a distribution of the proceeds. A salient el ment in such a reorganization is the discharge of demands of whatsoever sort, executory and conti gent, presently due or to mature in the future. such claims not the least important are those for re to accrue under a lease, or for damages or indemni payable because of the termination of a leasehol Obviously if such obligations are to be discharg they must be made provable, for they cannot be d stroyed" (Id. 438-439).

All of this applies also to Section 77.

The definition of a "creditor" in Section 77B includ the holders of all claims "whether or not such clai would otherwise constitute provable claims under th Act". The same language occurs in Section 77. T Court found that this clause

> "can have no other meaning than that claims up covenants for damages or indemnity arising out

> the termination of a lease after initiation of proceedings under § 77B are provable. The provision, however, creates no new claim. It merely treats the adjudication as a breach of covenant and gives a provable claim in virtue of the breach" (Id. 440).

This statement is equally applicable to Section 77. The Court then proceeded to discuss the further provision of Section 77B that "any person injured" by rejection of a lease shall be deemed to be a creditor.

> "Under the old law the rejection of a lease by a trustee in bankruptcy was not a breach of the lease, in the absence of a specific agreement that it should be so. The bankrupt tenant remained liable for the rent as it fell due but all the assets wherewith he might pay were taken from him" (Id. 441).

The landlord might reenter and terminate the lease for default in payment of rent, but although he was injured by the rejection, he had no standing as a creditor in the bankruptcy proceeding.

> "Having in mind this state of affairs the purpose is clearly to give a landlord a provable claim for injury due to the rejection of his lease, whether the instrument contains a covenant of indemnity or not" (Id. 441).

Section 77 contains a similar provision that "any person injured" by such rejection shall be deemed to be a creditor. Obviously, the comments in the *City Bank* case are applicable to it.

In *Kuehner* v. *Irving Trust Co.* (299 U. S. 445) this Court considered the three-year rental limitation on landlord's damages found in Section 77B. While the limitations in the two sections are differently expressed, the Court's comments are equally appropriate to both.

In the *Kuehner* case the lease contained a covenant of indemnity (Id. 447). The uncontroverted evidence showed that the landlord's damages exceeded three years' rent

(Id. 448). The question therefore involved the reasonableness and constitutionality of the three-year limitation.

On the subject of reasonableness the Court said

> "We cannot pronounce the limit set upon petitioners' claim arbitrary or unreasonable. It is well known that leases of business properties, particularly retail business properties, commonly run for long terms. The longer the term the greater the uncertainty as to the loss entailed by abrogation of the lease. Testimony as to present rental value partakes largely of the character of prophesy and, although that value is the cardinal factor in the measure of damages for which petitioners contend, it is obvious that, since the landlord is not bound to relet the premises for the unexpired term of the lease, that factor may have little real bearing upon the realities of the case. And, in any event, the possibility of the landlord's using the premises for his own purposes, their sale, their condemnation for public use, or their loss by foreclosure, renders an estimate of present rental value highly uncertain. Add to this the fact that bankruptcies multiply in hard times, and that estimates of rental value are made upon the basis of what a new tenant will pay in an era of economic depression, and the estimate becomes even more unreliable. Whatever courts, in the absence of a statutory formula, might feel compelled to adopt as the measure of damage in such a case, we cannot hold that Congress could not reasonably find that an award of the full difference between rental value and rent reserved for the remainder of the term smacks too much of speculation and that a uniform limit upon landlords' claims will, in the long run, be fair to them, to other creditors, and to the debtor" (Id. 454).

This analysis shows the reason for placing a limit on future damages, but has no more applicability to a limit of three years' rent than to any other reasonable restriction.

To illustrate the speculative nature of landlords' damages if based on the difference between rent and rental

value for the entire balance of the term of a lease, we call attention to the fact that in the instant case the lease at petition filed had 969 years to run (R. p. 106). The character of the business had already changed from part trolley and part bus at date of repossession to all bus at date of hearing (R. pp. 495-496). The latest complete evidence contained in the Record as to earning power is for the period prior to repossession (R. pp. 307-310, 620). The Record shows, however, that following repossession there was a substantial increase in gross revenues as compared with the year before (R. pp. 559-561 and 564) and that the profitableness of the business had increased (R. pp. 496 and 514). Moreover, the rent itself as reserved in the lease was subject to reduction as payments of interest and sinking fund on petitioner's outstanding bonds diminished, and was to be cut substantially in half on the retirement of the bonds (R. p. 120). If the bonds were paid off at their maturity in 1951, or even within several hundred years thereafter, the bulk of the term would have involved a very greatly reduced rental and there could obviously be no assurance at this time that the earnings from the property would not exceed that rental. Nor is there any evidence in the Record to support the basis (4%) on which petitioner sought to discount its "damage." The value of the use of money is not shown even at the present time, to say nothing of centuries hence.

In its essence the question of what is fair and equitable is not primarily one between the landlord and the tenant, but rather between one creditor and the other creditors. If the landlord gets a larger slice of the tenant's estate, the others entitled to share therein necessarily get less. They have to prove their claims with reasonable certainty. Equity, being equality, says that the landlord must do the same. Where neither the existence or the amount of one creditor's claim can be established, it is not fair that he should be allowed to take away from those who can show

their damages in accordance with recognized standards of proof, especially since, as this Court has pointed out, landlords whose leases are rejected

> "get back their property . . . whereas merchandise creditors, lenders, and others, recover in specie none of the property or money which passed from them to the debtor" (299 U. S. 455).

Even in the case of the much shorter lease of the Old Colony Railroad, the Circuit Court of Appeals, after holding that it was bound by its decision in the instant case, said,

> "Even if we were free, we should not have sustained the full extent of the plaintiff's claim: it is a fanciful notion that one may forecast the future value of a railroad half a century hence" (*Old Colony Railroad Company* v. *The New York, New Haven and Hartford Railroad Company*, 98 F. (2d) 670, 672).

3. The Lower Courts' Formula.

The District Court (Judge Hincks) in this case was faced with the problem of determining the meaning of a previously uninterpreted statutory provision. After analysis of the law as it existed prior to the amendments of the Bankruptcy Act and the decisions of this Court under Section 77B, Judge Hincks came to the conclusion that a landlord's claim under Section 77 is provable, but that his remedy is limited (R. pp. 326-330).

Pointing out that this Court in the *Kuehner* case sustained the reasonableness of the three-year limitation "largely upon the ground of the inherent uncertainty in ascertaining future damages," the District Court commented upon the fact that equal or greater uncertainty exists in cases falling within Section 77 and concluded that

> "the clause now under consideration was intended as a limitation, not recognized by the general law relat-

ing to damages, upon the amount for which such claims should be allowed" (R. pp. 331-332).

Referring to the change in the phraseology of the 1935 amendment between the time it was introduced in Congress and final enactment, the District Court pointed out that the original text was admirably worded to allow unlimited future damages. Congress in changing the language

> "may well have had in mind that passage of the opinion in the Crosstown Company's Appeal in the *Pennsylvania Steel* case, 198 Fed. at page 759, wherein 'future damages' were stigmatized as conjectural, foreshadowing the recent strictures on the subject in *Kuehner* v. *Irving Trust Co.*, 299 U. S. at page 454" (R. p. 334).

The court then proceeded to construe "actual" as meaning not merely "non-speculative."

> "For neither equity nor the law have viewed *future* damages, such as are ordinarily assessed by way of compensation for the anticipatory breach of contract, as being essentially speculative. Nevertheless, the court suggested in the *Kuehner* case, *supra* (page 454) that an award based on estimates or findings involving rental values for the remainder of the term sufficiently smacks of speculation to justify the imposition of a legislative limitation for purposes of Sec. 77B. Essentially, the suggestion is that for purposes of Sec. 77B Congress authorized the allowance of damages smacking of speculation, although not technically speculative, but minimized the speculative element by the imposition of a categorical limitation" (R. pp. 334-335).

Following this thought the court inferred that by using different language in Section 77

> "Congress sought not merely to restrict but wholly to eliminate this speculative element by confining such controversies to a consideration of the past which is *actual*, to the exclusion of the future which

> in a sense is speculative. The fact that long term leases, such as that here involved, not uncommonly are found in the capital structure of railroad companies, adds to the reasonableness of this conclusion. Surely it is not strange that Congress should seek to limit a controversy which otherwise would include in its scope half the Christian era" (R. p. 335).

The court thus concluded that "actual damage" means accrued damage, but proceeded to provide machinery by which the time of accrual should be extended to the latest date consistent with the orderly administration of the reorganization. Referring to the *Pennsylvania Steel Company* case and others which follow it, the court accepted the rule that damages should be allowed which mature "within a reasonable time before distribution can be made" (R. pp. 335-336).

The court thereupon held that damages measured by the difference between the rent reserved and the earnings of the property up to the date of hearing should be allowed, with the further right to the claimant, in common with all other claimants under rejected leases, to apply for a subsequent hearing at the latest practicable date to be determined by the court during the reorganization proceedings for the purpose of proving similar damages up to that date (R. pp. 336-338). Suggested procedural criticisms of this plan were discussed and dismissed by the judge in the light of his experience and familiarity with a complicated railroad reorganization proceeding (R. pp. 338-340). The court's conclusion was

> "that the procedure outlined accords not only with the needs of justice but to the convenience of administration as well. It accords with the statutory injunction in that it makes free use of 'the principles obtaining in equity proceedings' " (R. p. 340).

The Circuit Court of Appeals in affirming the District Court's decision held that "he applied equitable principles" (R. p. 1363).

Thus the lower courts have adopted and approved a formula under which the landlord's damages are limited substantially in accordance with the rule for allowability of such damages in equity proceedings. They have applied the test that the damages shall become certain within the period of reorganization and have thus complied with the limitation contained in the statute.

In *Old Colony Railroad Company* v. *The New York, New Haven and Hartford Railroad Company, supra*, the Circuit Court of Appeals followed its decision in the instant case in affirming an award of damages based on the District Court's formula. By way of comment the court said, however,

> "We need not say whether, if the matter were for the first time before the court as now constituted, a majority might have been disposed to allow future damages for a period of say five or ten years, on the theory that present estimates for as long as that might have some validity" (p. 672).

This language was obviously not intended to suggest any magic in five or ten years as such. Its only possible basis would be that in some cases evidence of present conditions might be considered sufficiently indicative of a brief period in the future to satisfy the court's conscience that damages for such period had been proved with the requisite degree of certainty. Though such a rule might conceivably have been adopted by Congress, the language of Section 77 does not suggest that intention.

The "five or ten years" suggestion is subject to another criticism in that as applied to a lease with fifty, or nine hundred and fifty, years to run the estimated damages for a shorter period have little or no relation to the full future damages. Even though one might be able to forecast what loss a lessor may suffer within the next few years it does not follow that he would suffer anything during the whole remainder of the term. In forty or fifty years, let alone nine hundred and fifty, conditions might

well change so that he would in fact ultimately benefit from the rejection. Consequently, not only the amount, but even the existence, of damages would be speculative.

4. Constitutionality.

In the *Kuehner* case the provision of Section 77B limiting the landlord's recovery to not more than three years' rent was held by this Court to be reasonable and constitutional. While the maximum there involved differed from that herein discussed, there is nothing in the Court's opinion which would not be equally applicable to the limit based on the *Pennsylvania Steel* case test.

In the *Kuehner* case it was found on uncontroverted testimony that damages for the remainder of the term exceeded the amount of rent for three years. The contention was made that the statutory limitation

> "will in some instances limit the amount allowed to a figure less than the landlord's actual ultimate loss, and thus partially destroy his remedy for enforcement of his contract".

The three-year maximum was nevertheless held not to be in violation of any provision of the Constitution (299 U. S. 445, 450).

This Court stated that the object of the Bankruptcy Law

> "is the equitable distribution of the debtor's assets amongst his creditors . . . Congress, in determining what such an equitable distribution demands, is free to establish standards of provability and measures of allowance regardless of the claimant's ability to maintain an action in a court or the measure of his recovery in such an action if maintainable" (Id. 451).

Answering the contention that the limitation impairs the obligation of a contract, the Court pointed out that the Constitution does not forbid Congress to do so and that

every Bankruptcy Act "avowedly works such im-
ent". The Fifth Amendment

does not prohibit bankruptcy legislation affecting
e creditor's remedy for its enforcement against the
btor's assets, or the measure of the creditor's par-
ipation therein, if the statutory provisions are con-
mant with a fair, reasonable, and equitable distribu-
on of those assets" (Id. 452).

Section 77B recognizes the petitioner's claim and
ts it to share in the distribution of the debtor's
, the question is whether the remedy is so arbi-
y circumscribed as to deny due process of law. This
on the Court answered in the negative, saying

The tenant's bankruptcy removed all his assets
rom the reach of the landlord and left, as the latter's
nly remedy, suits against an empty corporate shell
r a destitute individual. In framing the reorgani-
ation statute Congress obviously attempted to
ward landlords an equitable share in the debtor's
ssets as, in justice, it was bound to do since the pur-
ose was to discharge the debtor from liability to
uture suits based upon the lease. It is incorrect to
ay that Congress took away all remedy under the
ease. On the contrary, it gave a new and more cer-
ain remedy for a limited amount, in lieu of an old
emedy inefficient and uncertain in its result. This
s certainly not the taking of the landlord's property
ithout due process" (Id. 453).

e Court's discussion of the speculative nature of a
ord's damage on rejection of a long term lease is
d above (p. 12) and leads to the conclusion that

"we cannot hold that Congress could not reasonably
find that an award of the full difference between
rental value and rent reserved for the remainder
of the term smacks too much of speculation and that
a uniform limit upon landlords' claims will, in the
long run, be fair to them, to other creditors, and to
the debtor" (Id. 454).

In answer to the contention that landlords are thus put on a different basis from other creditors, the Court found that a sufficient ground for this distinction is that landlords, unlike other creditors, get back their property (Id. 455).

Commenting on the contention that the statute is arbitrary because the uniform limitation represents a varying proportion of the actual loss of individual landlords, the Court said

> "If, however, the statute does not deal unfairly with the petitioners it does not lie in their mouths to object because someone else perchance will receive a larger proportion of his ultimate loss as the same is ascertained years hence than will the petitioners. Congress, not unreasonably, felt that it was necessary, in the interest of expedition of proof and allowance of landlords' claims, which had never theretofore been permitted to share in a bankrupt debtor's assets, to fix a reasonable limit upon such claims. Naturally the amount fixed cannot bear the same relation to the ultimate loss or damage in every case. But it does not follow that, for this reason, all effort at uniformity of treatment of a peculiar class of claims, difficult of liquidation, is doomed to condemnation. All the arguments which petitioners submit would equally apply to any general and uniform formula for the limitation of such claims which the Congress might adopt. We are unable to say that that which Congress did select so discriminates between individual claimants to the detriment of the petitioners as to render it unconstitutional as to them" (Id. 455-456).

It will be noted that every word of these quotations from the *Kuehner* case could have been used if the limit under consideration had been the formula adopted by the lower courts in the present case. Under the latter the landlord whose claim has been made provable receives

> "a new and more certain remedy for a limited amount, in lieu of an old remedy inefficient and uncertain in its result" (Id. 453).

is exactly the situation of petitioner herein.

re is thus no longer any question that the remedy of llord-creditor may be limited by statute so that his ery may be less than the amount of his ultimate l damage even though his claim for the entire nt of such ultimate actual damage is made provable discharged. The only question is as to the reason- ess of the limitation of the remedy. Unless a statute lown the remedy in such a way as would be arbitrary reasonable, it must be upheld, and even the fact that some conceivable circumstances it might produce reasonable result as to some creditor will not permit ourt to overthrow the statute in a proceeding where petitioner's remedy is not unreasonably curtailed.

ther Equitable and Statutory Restrictions.

ile the formula adopted by the District Court is, as ve said, calculated to carry out Congress' intention iting a landlord's damages, it should not be applied regard of other limitations, either of a statutory or uitable character. If some other statutory provi- prescribes a limit which in a given situation would e the amount allowable under that formula, obvi- such statutory limitation must be observed. Simi- if there are special equities in a given case which it unfair to allow the full amount of damages which ormula would produce, they should be taken into nt (Cf. *Meadows* v. *Irving Trust Co.*, 299 U. S. 464). words "principles obtaining in equity proceedings" urse include any considerations which would move a t of equity.

spondents contended in the courts below (R. pp. , 1364) that there are in this case additional grounds restricting damages, namely, special considerations n equitable nature arising out of the terms of the e, and the one-year rent limitation on landlord's dam-

ages prescribed in Section 63(a)(9) of the Bankruptcy Act.

The special equitable considerations referred to consist of the benefits received by the petitioner on termination of its lease. Because of the terms thereof, petitioner, by exercising its option to terminate the lease after rejection, became entitled to retain without compensation several million dollars' worth of physical property which had been added to the demised premises by the tenant and also several million dollars' worth of payments made by the tenant into a sinking fund to retire petitioner's outstanding bonds.

The lower courts having held that these additions and sinking fund payments were forfeited to petitioner, it is the respondents' contention that those benefits resulting from the termination of the lease should in equity be offset against petitioner's losses from rejection in determining the net damages recoverable by the landlord. While respondents are now precluded* from asserting these special considerations as a reason for reducing the damages awarded by the lower courts, they are entitled, if this Court should adopt a theory which would otherwise increase those damages, to have them considered as an offset to any such increase (*United States* v. *American Railway Express Company*, 265 U. S. 425, 435; *Langnes* v. *Green*, 282 U. S. 531, 538).

Similarly as an offset to any increase in damages, respondents call attention to the one-year rent limitation. Section 63(a)(5) of the Bankruptcy Act (formerly Section 63(a)(7)) limits the recovery of a landlord for injury resulting from the rejection of a lease of real estate to an amount not to exceed the rent reserved for the year next succeeding the date of the surrender of the premises

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*Unless their non-acquiescence, as shown in the filing of their cross-petition for certiorari (October Term 1938, No. 105), takes them out of the class of non-appealing parties (See *Alexander* v. *Cowden Pipe Line Co.*, 290 U. S. 484, 487; *Chittenden* v. *Brewster*, 2 Wall. 191, 196).

or the date of reentry, whichever first occurs (Act of June 22, 1938).

The question is whether this provision is applicable to proceedings under Section 77. Sub-section (l) of that section provides

> "In proceedings under this section, and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and *the rights* and liabilities *of creditors*, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed" (Italics added).

This provision was contained in the same form in the original Section 77 enacted in 1933. The one-year rent limitation was added to Section 63 (a) in 1934 with nothing to indicate that it did not apply to the then unlimited damages for loss of future rent under Section 77. When the latter section was amended in 1935 it contained no provision that the one-year rent limitation should not apply. The more general limitation of damages to those determined in accordance with principles obtaining in equity proceedings was made applicable to any party injured by the rejection or non-adoption of any executory contract or lease. There is no necessary inconsistency between a general limitation applicable to all damages under executory contracts and a special limitation applicable only to landlords' claims under leases of real estate. The fact that leases of real estate were the outstanding type of executory contracts as to which the rule against damages for anticipatory breach had not previously been relaxed is sufficient to explain why Congress may have seen fit to retain the special limitation on landlords' damages.

6. Answers to Certain Contentions in Petitioner's Brief.

A. *Alleged deficiencies in property returned.*

Petitioner devotes more than half of its brief to a discussion of alleged deficiencies in the property returned to it on termination of the lease.

This matter, which is expressly admitted to involve the construction of the lease, not of the statute (Petitioner's Brief, pp. 5 and 21), is not now before the Court. It was not included in the "Questions Presented" in the petition for certiorari nor in the "Specification of Errors" in petitioner's brief in support thereof.

This Court has ruled that questions not raised in the petition for certiorari will not be considered if certiorari is granted (*General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177-179; *Johnson* v. *Manhattan Railway Company*, 289 U. S. 479, 494.

B. *Computation of Damages.*

Petitioner discusses in an appendix to its brief (pp. 29-31) the testimony on which it asserts damages should be computed and the meaning of the so-called "tax-free" covenant in the lease.

Some of petitioner's allegations are not supported by the Record, but it seems unnecessary to discuss them here, because neither the interpretation of the lease nor the sufficiency of proof of particular elements of damage is now before this Court. No such questions were raised in the petition for certiorari or the brief in support thereof.

Respectfully submitted,

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November 2, 1938.

APPENDIX.

Pages of Record Bearing on Issue of Damages for Rejection of a Lease.

A. *Pleadings, Orders, etc.*
1-8, 14-23, 46-49, 53-55, 61-85, 101-129, 283-286, 290-291, 307-312.

B. *District Court Opinion and Orders.*
313-316 (fol. 946), 326 (fol. 978) -343 (fol. 1028), 361 (fol. 1082) -363 (fol. 1088), 364-366 (notes 1, 4, and 5), 367-372, 376 (fol. 1128).

C. *Testimony*
377-378 (fol. 1133), 379-390 (Zipf), 495-496 (fols. 1484-1486) (Crosson), 513-514 (fols. 1537-1540) and 518 (Chapman), 559 (fol. 1676) -564 (fol. 1692) (Carr), 568 (fols. 1703-1704) (Bennett), 573-590 (Leete), 590-591 (fols. 1770-1772) and 616 (Harte).

D. *Exhibits*
617-623 (Ex. 1), 626-627 (Ex. 6), 628 (Ex. 7), 1313-1315 (Ex. 101, 102 and 103).

E. *Appeal Papers in C. C. A.*
1325-1353, 1357-1360.

F. *Opinion of and proceedings before C. C. A.*
1361-1368.